United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

No 2240.

7889

THE CAPITAL TRACTION COMPANY, A CORPORATION, APPELLANT,

vs.

SARAH VAWTER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 19, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 24, 1910.

In the Court of Appeals of the District of Columbia.

No. 2240.

THE CAPITAL TRACTION COMPANY, a Corporation, Appellant,
vs.
SARAH VAWTER.

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a Supreme Court of the District of Columbia.

Law. No. 51502.

SARAH VAWTER, Plaintiff,
vs.
CAPITAL TRACTION COMPANY (a Corporation) and METROPOLITAN COACH COMPANY (a Corporation), Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed, and proceedings had, in the above-entitled cause, to wit:

1 *Declaration.*

Filed March 24, 1909.

In the Supreme Court of the District of Columbia.

Law. No. 51502.

SARAH VAWTER, Plaintiff,
vs.
CAPITAL TRACTION COMPANY (a Corporation) and METROPOLITAN COACH COMPANY (a Corporation), Defendants.

The plaintiff, Sarah Vawter, sues the defendants, Capital Traction Company, a corporation organized under the laws of the United States in force in the District of Columbia, and the Metropolitan Coach Company, a corporation organized under the laws of the State of West Virginia, and both having their offices and doing

business in said District for that heretofore, to wit, on the 21st day of October, 1908, and prior thereto, the defendant, Capital Traction Company, was a common carrier of passengers for hire along certain lines of street railway owned and operated by it over certain streets in the City of Washington, District of Columbia, amongst others on U Street West from its intersection with 7th Street North to and beyond its intersection with 16th Street North in said City, and the defendant, Metropolitan Coach Company, was likewise a common carrier of passengers for hire over certain streets in said City and District by means of herdics or coaches drawn by horses, amongst others on 16th Street North from its intersection with Rhode
2 Island Avenue West to and beyond the intersection of said 16th Street North with said U Street West; and the plaintiff avers that on said day she boarded one of the herdics, or coaches, of the defendant, Metropolitan Coach Company, paid the fare entitling her to passage thereon, and thereby became and was a passenger of said defendant Metropolitan Coach Company; that said herdic, or coach, then proceeded northerly along said 16th Street until it approached the point before mentioned where the tracks of said defendant Capital Traction Company cross said 16th Street, and as said herdic, or coach, approached said crossing going north a car operated and managed by the servants of the defendant Capital Traction Company also approached said crossing from the east; plaintiff avers that it was the duty of the driver of the said herdic, or coach, and of the motorman and other employees of the defendant Capital Traction Company, to respectively so guide, control, manage and conduct the said herdic or coach, and the said street car, as to avoid imperilling the safety of the passengers in said herdic or coach; but notwithstanding their said duty in the premises, and wholly unmindful thereof, the plaintiff avers that said defendant, the Metropolitan Coach Company, became and was negligent in that its driver failed to ring his gong or bell, and failed to properly look out for any oncoming car, and bring his herdic or coach to a standstill on the south side of said defendant Capital Traction Company's tracks so as to avoid striking, or being struck by the car of the said defendant Capital Traction Company; and the defendant the
3 Capital Traction Company was negligent in that its motorman, when running his car west over said crossing at a high unlawful and dangerous rate of speed, failed to ring his bell or in any manner indicate the approach of said car, and failed to keep his car so reasonably under control and guidance as to enable him to stop it before colliding with the herdic or coach of the said Metropolitan Coach Company in which said plaintiff was a passenger, whereby, and by reason of which said negligence, said plaintiff, herself, in the exercise of ordinary care, was thrown violently against the floor and sides of the herdic or coach, and badly bruised, contused, cut and injured about the head and face; her ankle was badly sprained; the muscles and ligaments of her leg greatly strained and injured, and her nervous system shocked and impaired, and she was thus permanently injured, and by reason thereof became sick, sore, lame, and disordered for a long space of time, to wit, hitherto, and

will so remain in the future, during all of which time the plaintiff suffered and will continue to suffer great pain and anguish of body and mind, and was and still is unable to perform manual labor or to undergo any physical exertion, and was and still is prevented and incapacitated from performing her work of carrying on her regular vocation; and further said plaintiff has been specifically damaged by being forced to lay out and expend large sums of money for doctors' services in, to wit, $50. and money for medicines, drugs, linaments, and ointments, in, to wit, $25. in and about her endeavor to be healed and cured of said injuries, bruises, wounds,
4 hurts and cuts, so as aforesaid occasioned her, all to the damage of said plaintiff in the sum of $5,000; wherefore she brings this her suit, and claims of the defendants, the Capital Traction Company and the Metropolitan Coach Company, the sum of $5,000, besides costs.

LEONARD J. MATHER,
JOHN P. McMAHON,
Attorneys for Plaintiff.

Notice to Plead.

The defendants, and each of them are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after date of service hereof: otherwise judgment.

LEONARD J. MATHER,
JOHN P. McMAHON,
Attorneys for Plaintiff.

Plea of the Capital Traction Company.

Filed April 10, 1909.

* * * * * * *

The Capital Traction Company, the defendant in the above entitled cause, for a plea to the declaration of the plaintiff, Sarah Vawter, heretofore filed therein, says that it is not guilty in
5 the manner and form therein alleged.

R. ROSS PERRY & SON,
G. THOS. DUNLOP,
Attorneys for Defendant.

Plea of Metropolitan Coach Company.

Filed April 23, 1909.

* * * * * * *

Now comes the defendant, the Metropolitan Coach Company, a corporation, by its attorney, and for plea to the plaintiff's declaration filed in the above-entitled cause, says it is not guilty in manner and form as therein alleged.

M. J. COLBERT,
Attorney for Metropolitan Coach Company.

Joinder of Issue.

Filed April 24, 1909.

* * * * * * *

The plaintiff joins issue upon the Pleas of the defendant, the Capital Traction Company, and the defendant, the Metropolitan Coach Company, heretofore filed in the above entitled case.

LEONARD J. MATHER,
JOHN P. McMAHON,
Attorneys for Plaintiff.

6 *Amended Declaration.*

Filed May 13, 1910.

* * * * * * *

Comes now the plaintiff, Sarah Vawter, and with leave of the Court first had and obtained, files this her Amended Declaration, and sues the defendants, Capital Traction Company a corporation organized under the laws of the United States in force in the District of Columbia, and the Metropolitan Coach Company, a corporation organized and existing under the laws of the State of West Virginia, both having their offices and doing business in said District; for that, heretofore, to wit, on the 21st day of October 1908, and prior thereto, the defendant, Capital Traction Company, was a common carrier of passengers for hire along certain lines of street railway owned and operated by it over certain streets in the City of Washington, District of Columbia, amongst others on U Street West from its intersection with 7th Street North to and beyond its intersection with 16th Street North in said City, and the defendant, Metropolitan Coach Company, was likewise a common carrier of passengers for hire over certain streets in said City and District by means of herdics, or coaches, drawn by horses, amongst others on 16th Street North from its intersection with Rhode Island Avenue West to and beyond the intersection of said 16th Street North with said U Street West; and the plaintiff avers that on said day she boarded one of the herdics, or coaches, of the defendant, Metropolitan Coach Company, paid the fare entitling her to passage thereon, and
7 thereby became and was a passenger of said defendant, Metropolitan Coach Company; that said herdic, or coach, then proceeded northerly along said 16th Street until it approached the point before mentioned where the tracks of said defendant Capital Traction Company cross said 16th Street; and as said herdic, or coach, approached said crossing going North, a car, propelled by electricity, operated and managed by the servants or agents of the defendant Capital Traction Company, also approached said crossing from the East; and plaintiff avers that it then and there became and was the duty of the defendant Metropolitan Coach Company, by and through its driver, agent or employee in charge of its said herdic, or coach,

as likewise it was the duty of the defendant Capital Traction Company, by and through its agents and employees in charge of its said car, so to guide, control, manage and conduct the said herdic, or coach, and the said street car, respectively, as to prevent collision with each other, and to avoid endangering the safety of the passengers in said herdic, or coach; yet the plaintiff avers that unmindful of its duty in the premises, the said defendant Metropolitan Coach Company, its driver or employee in charge of said herdic, or coach, conducted it so carelessly and negligently that, while said herdic, or coach, was crossing the tracks of defendant Capital Traction Company at the intersection of said streets, and before said herdic, or coach, had entirely crossed said tracks, the said car of the defendant Capital Traction Company collided with and crashed into said herdic, or coach, with great force and violence; and the plaintiff further avers that the defendant Capital Traction Company,
8 unmindful of its duty in the premises was negligent in that its motorman when approaching said crossing was running said car at a high, unlawful and dangerous rate of speed, failed to ring his bell or in any manner indicate the approach of said car, and failed to keep said car so reasonably under control and guidance as to enable him to stop it before colliding with said herdic, or coach, and by reason of the negligence aforesaid the said car of defendant Capital Traction Company collided with and crashed into said herdic, or coach, of said defendant Metropolitan Coach Company, in which plaintiff was a passenger; whereby the plaintiff, who was conducting himself in a careful and prudent manner, and without any negligence or want of due or reasonable care on her part, was thrown violently against the floor and sides of said herdic, or coach, and badly bruised, contused, cut and injured about the head and face; her ankle was badly sprained and permanently injured; the muscles and ligaments of her leg greatly strained and injured, and her nervous system shocked and impaired, and by reason thereof she became sick, sore, lame and disordered for a long space of time, to wit, hitherto, and will so remain in the future, during all of which time the plaintiff suffered and will continue to suffer great pain and anguish of body and mind, and was and still is unable to perform manual labor or to undergo any physical exertion, and was and is prevented and incapacitated from performing her work of carrying on her regular vocation; all to the damage of said plaintiff in the sum of Five thousand dollars ($5,000); wherefore she brings this, her suit, and claims of the defendants, the Capital Traction
9 Company and the Metropolitan Coach Company, the sum of Five thousand dollars ($5,000), besides costs.

LEONARD J. MATHER,
JOHN P. McMAHON,
Attorneys for Plaintiff.

I have no objection to the filing of this amended declaration:

M. J. COLBERT,
For Defendant Metropolitan Coach Company.
G. THOMAS DUNLOP,
For Defendant Capital Traction Company.

(Endorsed:)

Leave to file the within Amended Declaration granted this 13th day of May, 1910.

HARRY M. CLABAUGH,
Chief Justice.

Plea of Metropolitan Coach Company to Amended Declaration.

Filed May 14, 1910.

* * * * * * *

For plea to the amended declaration filed in the above-entitled cause on the 13th day of May, 1910, the defendant, the Metropolitan Coach Company, says it is not guilty as alleged.

HAMILTON, COLBERT, YERKES & HAMILTON,
Attorneys for Defendant, Metropolitan Coach Company.

Plea of the Capital Traction Company to Amended Declaration.

Filed May 19, 1910.

* * * * * * *

The Capital Traction Company, one of the defendants in the above entitled cause, for a plea to the amended declaration of the plaintiff, Sarah Vawter, heretofore filed in the above entitled cause on the 13th day of May, 1910, says that it is not guilty in the manner and form therein alleged.

R. ROSS PERRY & SON,
G. THOMAS DUNLOP,
Attorneys for Defendant, The Capital Traction Co.

Joinder of Issue.

Filed May 19, 1910.

* * * * * * *

The plaintiff joins issue upon the Plea heretofore respectively filed in the above entitled case by the defendants the Capital Traction Company, and the Metropolitan Coach Company, to the Amended Declaration herein.

LEONARD J. MATHER,
JOHN P. McMAHON,
Attorneys for Plaintiff.

Supreme Court of the District of Columbia.

TUESDAY, *May* 31*st,* 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

Comes now as well the plaintiff by her attorneys Messrs. Mather & McMahon, as the defendants, by their respective attorneys of record, and a jury of good and lawful men of this District, to wit: Nicholas R. Grimm, Rob't F. Walker, Chas. F. Herrmann, Rob't G. Amies, Chas. L. Howard, Patrick Dugan, John T. Hendrick, Chas. M. Pugh, Dornin Ellis, Chas. W. Cheek, Daniel I. O'Connor, and George C. Crosswell, who are duly sworn to well and truly try the issues herein joined, and after hearing the same in part, and being given the case in charge as to the defendant Metropolitan Coach Company, say they find herein in favor of said defendant, and after further hearing the issues herein as to defendant Capital Traction Company, the jury is respited until tomorrow morning at ten o'clock.

12 WEDNESDAY, *June* 1*st,* 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh Chief Justice, presiding.

* * * * * * *

* * * * * * *

Come again the parties hereto aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who after further hearing the case and being given the same charge, upon their oath say they find the issues herein in favor of the plaintiff as against the defendant Capital Traction Company, and assess her damages by reason of the premises, in the sum of Five Hundred Dollars.

Motion for a New Trial.

Filed June 4, 1910.

* * * * * * *

Now comes the defendant The Capital Traction Co. and moves the Court for a new trial in the above entitled cause, and for reasons therefor shows to the Court:

1. That the verdict is contrary to the evidence.
2. That the verdict is contrary to the weight of the evidence.
3. That the verdict is contrary to the law as given to the jury by the Court.
4. That the Court erred in instructing the jury.
5. That the Court erred in admitting evidence contrary to law.

13 6. That the Court erred in refusing to admit evidence contrary to law.

7. That the damages given by the verdict are excessive.

8. That the Court erred in granting certain instructions prayed by the plaintiff.

9. That the Court erred in instructing the jury at the close of the plaintiff's testimony, in chief, to render a verdict for the defendant, Metropolitan Coach Company.

R. ROSS PERRY & SON &
G. THOMAS DUNLOP,
Attorneys for Defendant, The Capital Traction Company.

Notice.

To Messrs. Leonard J. Mather and John P. McMahon, Attorneys for Plaintiff:

You will please take notice that the above Motion will be called to the attention of Mr. Chief Justice Clabaugh in Circuit Court No. 2 on Friday, the 10th day of June, at ten o'clock A. M. or as soon thereafter as counsel can be heard, and an Order asked thereon.

R. ROSS PERRY & SON &
G. THOMAS DUNLOP,
Attorneys for Defendant, The Capital Traction Company.

14 Service of a copy of the above Motion and Notice is hereby accepted this 4 day of June, 1910.

LEONARD J. MATHER,
JOHN P. McMAHON,
Attorneys for Plaintiff.

Supreme Court of the District of Columbia.

THURSDAY, *June 16th,* 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

It appearing that, under the Rule of Court judgment should be rendered herein on the verdict herein in favor of the defendant Metropolitan Coach Company, it is so ordered. Wherefore, it is considered, that the plaintiff herein take nothing by this action as against the defendant Metropolitan Coach Company, that said defendant go hereof without day, be for nothing held and recover of plaintiff its costs of defense to be taxed by the Clerk, and have execution thereof.

FRIDAY, *June 24th,* 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice presiding.

* * * * * * *

15 Upon consideration of defendant's motion for a new trial filed herein, it is ordered that said motion be and the same is hereby overruled and judgment on verdict is ordered; where-

fore, it is considered that the plaintiff herein recover of defendant Capital Traction Company the sum of Five Hundred Dollars ($500.00) with interest from this date together with costs of suit to be taxed by the Clerk, and have execution thereof.

From the foregoing judgment, the defendant by its attorneys of record in open court, notes an appeal to the Court of Appeals of the District of Columbia; whereupon, the penalty of a bond to operate as a Supersedeas is hereby fixed in the sum of One Thousand Dollars.

Memoranda.

July 1, 1910.—Supersedeas bond on appeal approved and filed.
July 12, 1910.—Bill of Exceptions submitted.

Supreme Court of the District of Columbia.

MONDAY, *October* 3, 1910.

Session resumed pursuant to adjournment, Mr. Chief
16 Justice Clabaugh presiding.

* * * * * * *

The Court having this day signed the bill of exceptions of the defendant, the Capital Traction Company, heretofore submitted herein, now orders the same of record as of the time of the noting thereof, at the trial.

Further upon motion of said defendant's attorneys and consent of plaintiff by her Attorney in open Court, it is ordered that the time within which to file the transcript of record in this cause in the Court of Appeals of the District of Columbia be, and it is hereby further extended to and including October 24, 1910.

Bill of Exceptions.

Filed October 3, 1910.

* * * * * * *

The above-entitled cause came on for trial at the April Term of the Circuit Court before Mr. Chief-Justice Clabaugh and a jury.

And thereupon, after the said jury had been duly sworn, the plaintiff, to maintain the issues on her part joined, gave in evidence her own testimony, as follows:

That on the 21st day of October, 1908, she was a passenger in a herdic coach of the defendant, the Metropolitan Coach Company, which was going north on Sixteenth Street west, in the City
17 of Washington, District of Columbia, and was approaching U Street north, along which latter street the car-tracks of the defendant, the Capital Traction Company, then ran; that while she was seated in said herdic cab she heard a crash as of a collision, and that is the last she remembers. The next she remembers, someone

helped her out of the herdic, and assisted her to her home, which was nearby.

The witness then proceeded to describe her injuries, which were quite severe, and her financial loss by reason of said injuries.

And next the plaintiff, to maintain the issues on her part joined, gave in evidence the testimony of Dr. FREDERICK H. MORHART, who testified as to her injuries from the accident in question.

And next the plaintiff, to maintain the issues on her part joined, gave in evidence the testimony of WILLIAM B. SLATER, to the effect that he was standing on the corner of U Street and New Hampshire Avenue at about a quarter past six o'clock in the evening, just as it was getting dark; that he looked east and saw the car of the defendant, the Capital Traction Company, coming, and he saw the herdic of the defendant, the Metropolitan Coach Company, coming toward the south track on U Street of the defendant, the Capital Traction Company. He reckoned that there would be an accident from the way the car was coming and where the herdic was, and so he stood there and viewed it. Just as the herdic was crossing the north track, this car struck it near the hind wheel. The herdic was almost over
the north track. It turned the herdic sideways and carried
18 it to the corner of Sixteenth Street—the northwest corner;
that the force of the collision carried the herdic past the corner to the first tree-box, where it stopped. The car might have been going somewhere between thirteen and fourteen or fifteen miles an hour—something like that. When he first saw the car it was about midway of the block. He did not see any attempt to decrease the speed of the car until the crash came. The motorman was standing up there with his hands upon his brake, looking north. He had his head turned to look that way. The lamps about there were lit. The motorman did not ring any bell until just before the collision. The herdic horses were going along just on a slow trot, just a slow gait across the track. The herdic was going north along the east side of Sixteenth Street. After the herdic was struck, the driver of the herdic was found lying out in the street near the curb. Saw Mrs. Vawter as she was being lifted out of the herdic, and saw Officer Foley there.

On cross-examination the witness said that at the time of the accident the driver of the herdic was sitting down something like this (indicating), kind of leaning over in that position (indicating). It appeared to the witness as if the driver of the herdic were looking north, too. It didn't look as if he was looking either way, to the car or anything else, although he could not discern that very plainly. "Saw both the car and the herdic about the same time. That drawed my attention about there going to be an accident. The car was about midway of the block between Fifteenth and Sixteenth
Streets. I am positive as to this, for I pass that block nearly
19 every day. The car was coming at a good speed. When the
car struck the herdic, that throwed the herdic on the other side of the car, and the car was between us. Afterwards saw the

driver of the herdic lying on the ground." Didn't see the motorman do anything. Didn't hear him sound his gong until just before he struck the herdic. As the car struck the herdic the overhead switch blowed off. Don't remember seeing the motorman put on his brake as he came near the herdic; can't exactly say yes and can't exactly say no.

On cross-examination the witness said that there was nothing to hinder either the motorman from seeing the herdic and its driver, or the driver from seeing the motorman and the car. There was nothing at all between them. The collision occurred on the east side of Sixteenth Street.

On cross-examination for the defendant, the Metropolitan Coach Company, the witness said that when he first saw the herdic it was on the east side of Sixteenth Street; the horses were between the tracks, and the coach on the south track; and that at the moment he saw the coach coming at a slow trot the car was midway of the square, and that the square was a long one; that there was time enough for the motorman to stop the car before striking the herdic coach.

And next to maintain the issues on her part joined the plaintiff gave in evidence the testimony of Officer DANIEL FOLEY, who testified that he was a police officer, and had been one for nearly seven years, and that he saw the accident in question; that it was nearly 7 o'clock in the evening; that he was, at the time of the accident, at Sixteenth and U Streets; that what first attracted his attention was the car of the Capital Traction Company, which was coming very fast, and the coach of the Metropolitan Coach Company was traveling very slow. The coach was on the track, with the horses past, and he saw the car was coming so fast that he did not think the coach could get past if the motorman didn't stop. So he started from this point (indicating) towards the car, and held up his hand and holloaed at the motorman; and when the motorman saw him and saw the coach ahead, then he started to wind his brake up. The motorman was about at the east curb of Sixteenth and New Hampshire Avenue, or U Street and New Hampshire Avenue, when he started to wind his brake, and the herdic was practically in the middle of the street; if anything, a little to the west going north. When he first observed the car it was coming west on U Street between Fifteenth and Sixteenth Streets, maybe fifty yards from Sixteenth Street, half-way of the block, considerably more than half-way of the block. The car was going, to the best of witness's judgment, from the position where he stood, about twenty miles an hour when he first observed it; but he thinks the motorman threw off the power; but the car was going at a very fast speed; did not see the motorman winding up his brake, so he ran toward him and holloaed to him. The car kept on coming, and then the motorman started to wind the brake up, and then came the crash. The first was a slight jar, as though the fender struck him, and then came a heavy crash, and the man was throwed out in the street, and the cab

was pushed to one side, and the car went a little way and
21 stopped. A lady came with a robe or blanket or something, and we put him on the parking near the Westover Apartment House. Then we called for an ambulance. It was a Chevy Chase car. After it struck the herdic it carried it clean across Sixteenth Street. It struck the herdic pretty well toward the back—practically back about where the brake would take the back wheel. He ran toward the car that was coming toward Sixteenth Street. "I had reached close to the tracks. I had been at this place (indicating). I had my wheel with me, and I was in plain clothes at the time, and I ran from here (indicating) up somewhere along here (indicating), and I held my hand up and holloaed to the motorman, and the motorman wound the brake up as fast as he could. I holloaed just to call his attention to look out. It was just getting dark, in the dusk of the evening." Does not think the herdic was seriously damaged. There were some parts broken; forgets what parts. To the best of witness's judgment, the car struck the cab when it (the car) was going about eight miles an hour. It had reduced the speed that far. Witness did not hear any bell ring; does not remember of any bell being rung. The motorman was pretty busy winding the brake when he saw him.

On cross-examination the witness said that the glass in the herdic was broken, as was the brace running across underneath where the brake was fastened—that it was partly dislocated—although the witness didn't examine it very close. The pole was also twisted out of its place. Didn't examine it very close. Just took a little glance
at it: that was all. The driver of the herdic was sitting up
22 in his seat in front of the cab. Saw him look toward the car, and saw him in the motion of hitting the horses when the car struck him. He (the driver) went to raise his hand before the car struck him. He went to raise his hand to hit the horses to hurry them along, and evidently the car struck him in that position, with his hand up.

On cross-examination the witness testified further that there was nothing between the car and the herdic to keep the motorman from seeing the herdic: that when the herdic first got upon the tracks the car was between fifty and one hundred yards to the east, maybe more than that, and that the motorman had time enough to stop his car.

And next to maintain the issues on her part joined the plaintiff gave in evidence the Police Regulations of the District of Columbia in force at the time of the accident in question, prescribing the rate of speed of cars as fifteen miles an hour between street crossings, and six miles an hour at crossings.

And thereupon the plaintiff rested her case.

And next thereupon Michael J. Colbert, Esq., counsel for the defendant, the Metropolitan Coach Company, addressed the Court as follows:

"May it please the Court, I think there is no case against the defendant Coach Company, and I move that a verdict be directed on the evidence already submitted."

Whereupon and in the absence of the jury Mr. R. Ross Perry objected to the granting of the said motion on the ground that it would be equivalent to directing a verdict for the plaintiff
23 against the Capital Traction Company.

But the learned trial Justice decided the said motion as follows:

"The COURT: I think it must be a primary principle of law that before a defendant is obliged to open its lips it is necessary to have some proof of negligence against it. I cannot imagine that there is any other rule of law than that; and so the real question here is simply: Is there any proof against the defendant Company, the Metropolitan Coach Company, of negligence on its part? That is the single, simple question. If there is not the Court ought not to let it go to the jury on the theory of Mr. Mather, even though Mr. Perry has now suggested some reasons why Mr. Mather's contention should prevail and Mr. Colbert's should not. The real question before the Court is simply this: Is there any evidence tending to show that the defendant company, the Metropolitan Coach Company, was guilty of any negligence? The only question in the case is whether the Metropolitan Coach Company, in approaching the railroad tracks and attempting to cross, was guilty of any negligence. It is stated that the car was from fifty to one hundred and fifty yards away—the middle of the block, is the way both witnesses put it, one saying it was fifty to one hundred and fifty yards away from the corner when this coach was on the south-bound track, and the horses between the south-bound and the north-bound track. It was specifically brought out that the horses were between the south and the north-bound track, and the coach on the south-bound track. They were then fifty to one hundred and fifty yards away; one of the wit-
24 nesses giving the rate of speed of the car, and saying that it was going about twenty miles an hour. The other witness differed somewhat, but both testified that the car could have been stopped at the stopping-place at Sixteenth Street. I cannot see any negligence to be submitted to the jury on that proposition. There is certainly no negligence in a man attempting to cross a street, because I think it is pretty well established here, in a case that Mr. Perry tried not very long ago, that a man has a right, when he undertakes to cross the track of a railroad company, to assume that they are going to do what is proper and right in the matter of attention to the law that governs its running. If that be so, and it likewise be true that they had ample time to stop before they got to Sixteenth Street, then on what possible ground could the jury find there was negligence in the Coach Company undertaking to cross that track under those circumstances? That applies to the suggestion made by Mr. Perry.

"In respect to Mr. Mather's suggestion that the law says that when an accident happens to a party carrying passengers that all that is necessary is to establish the fact of the accident and then the other party must show that it was not negligent—must explain the accident, in other words—that is equally true; but it does not seem to me to make any difference how it is explained, so it is explained.

If the plaintiff explains it himself, and says there was no act of negligence on the part of the defendant company, it is just as ample as if the defendant itself explained it. Otherwise the Court would be put in the position of saying that the evidence of one party shows no negligence, and still the Court has no right to assume that that is true, but the party who was charged with negligence, but proven by the plaintiff not to be negligent, still must explain it. I cannot imagine that that can be so; so I think I shall have to grant the motion."

Whereupon the following occurred:

"Mr. PERRY: I think I will reserve an exception to that."

Whereupon the trial Justice entered the said exception upon his minutes.

(At this point the jury returned to the court room.)

"The COURT: Mr. Clerk, instruct the jury to find a verdict in favor of the defendant, the Metropolitan Coach Company."

(The verdict of the jury was taken as directed by the Court.)

To which action of the Court the defendant, the Capital Traction Company, then and there excepted, and the trial Justice entered the said exception upon his minutes.

And thereupon, to maintain the issues on its part joined, the defendant the Capital Traction Company gave in evidence the testimony of FRED P. SAWYER, who testified that his name is Frederick P. Sawyer; that he was the driver of the herdic coach in question; that he knows nothing of the accident; that he supposed he was going south, but they all said he was going north. That is what everybody told him afterwards. That is all he can remember about it—when he was on the north side of the track, going south. That he does not know where the accident occurred; afterwards says he does know and that it was at Sixteenth and U Streets; that he does not know a thing about it; all the remembrance I have got of it, I thought I was going south; my recollection was knocked all out of me; that he does not recollect having crossed the Sixteenth and U Street tracks, going north; that he watered his horses at the watering-trough on Sixteenth Street north of U Street, when he started south; that when he started south and approached the railroad tracks at U Street he doesn't know whether he had one or ten passengers, but he saw a car; that the car was near the old pumping station to the west of Sixteenth Street; that it was coming east toward him; that it was coming on the south track, and that is the last he can remember.

On cross-examination witness testified that he was not a drinking man, and that he didn't know a thing after the collision; that everybody thought he was dead when they picked him up.

And next to maintain the issues on its part joined, the defendant, the Capital Traction Company, gave in evidence the testimony of O. G. MEDLER, who testified that on the occasion in question he was a passenger seated about the middle of the car of the defendant, the

Capital Traction Company, which struck the herdic coach, but did not see the accident; that he did not see the collision because he was busy reading a paper; that it was a Chevy Chase car going west—a through car; thought that at the time of the accident the car
27 was going at the usual rate, if anything going too slow for him; when the jolt came saw the old driver lying sprawled out in the street; I saw that the glass in the front of the car was broken.

On cross-examination the witness testified that he did not notice any ringing of the bell or know whether the car was going fifteen, twenty or twenty-five miles an hour at the time; that he had no idea of the speed of cars as they either go fast or slow with him; does not know how far west of Sixteenth Street the herdic was shoved by the collision; doesn't remember whether the car stopped between Fourteenth and Sixteenth Streets where the collision occurred.

And next, to maintain the issues on its part joined, the defendant, the Capital Traction Company, gave in evidence the testimony of JAMES H. M. PEARSON, who testified that on the occasion in question he was a motorman in the employ of the Capital Traction Company, and in charge of the train which collided with the herdic coach in question; that he knows very little about the accident. I was going up U Street, and he was crossing the track, and I struck him. I struck the herdic. That the car was a Chevy Chase car, and between Fifteenth and Sixteenth Streets was not running over four or five miles an hour at the highest; that as he approached the corner of Sixteenth Street he saw the herdic on the lower side of the south-bound track, and he (the driver of the herdic) started to pull up. The witness started to stop at first, and the driver pulled the horses up, and then the driver struck bias across the track after the
28 motorman started again. The driver started up and went bias across the track, and the car struck him as he went across there. The driver was going north, or northwest. His horses were on the south-bound track—on the lower rail, or the south rail. The front feet of the horses were right on the track. At that time the horses were about twenty or thirty feet from the front of the car. The car was running about four or five miles an hour at the time, I guess—about four or five miles an hour, as well as I can come at it. When the driver pulled the horses up on the south track, the herdic was about twenty or thirty feet from the car. The witness then released the brake and let the car drift on. He just commenced to wind the brake up when the driver started to pull up, and after the witness thought that the driver was going to pull up he released the brake and let the car go on; and then the driver started right across the track. The car did not go over five feet after hitting the herdic. The herdic was not upset, and the car did not get off the track. Did not see an officer in citizen's clothes or anyone else run out and throw up their hands to stop the car, although it might have happened without his seeing it. An officer might have run up and throwed up his hands, but I didn't notice. When the witness saw that the car

was going to strike the herdic he reversed the current, and then the overhead switches blew off. The current was too strong for them to hold. When that happened there was no power there, and the witness applied the brakes and stopped the car. Witness rang the gong several times going up U Street. There was a wagon driving on the same side he was on, only the wagon was out in the street,
29 and witness sounded the gong so the driver of the wagon would know he was coming. The wagon was ahead of the witness. It was about half-way between No. 9 engine house and Sixteenth Street where the accident happened. Witness did not see the driver of the herdic before he drove on the track. Witness saw the herdic before it drove on the track, and of course saw there was someone on it. The driver was holding the lines, sitting up on the seat. When the driver started to cross the track, after having pulled up, the witness was twenty or thirty feet away from the driver. Witness could not have stopped the car in that distance. He did stop it as quick as he could.

On cross-examination the witness said that he was running on the fifth point between Fourteenth and Fifteenth Streets, and cut it off to nothing about half-way between these streets in order to slow down at Sixteenth Street, for it is a rule of the company to slow down at all crossings, and Sixteenth Street is a much-traveled street; that he was going at the rate of four or five miles an hour between Fifteenth and Sixteenth Streets, and didn't lose any speed until he saw the driver of the herdic when he started to stop; and then he (the motorman) checked up his car a little—checked it up to about four miles and a half; that when he reached Sixteenth Street he was not going over four miles an hour; when he first saw the herdic it was going a kind of bias like on the south side of the track, and was about five or ten feet from the east curb; the herdic was right at the south rail on the south track; that he did not see it until it had reached that point; that he was looking north as he came
30 along the latter half of the square between Fifteenth and Sixteenth Streets, and that was his reason for not seeing the herdic until it had reached the south rail of the south track; the herdic had not stopped, but it had pulled up, slowed up and started to stop. "I thought it started to stop." It did not completely stop; the horses were walking, and then they started off in a full trot after that; they were walking when they were on the south track; they had not crossed the south track and gotten into the space between the south and north-bound tracks—not quite; they had not quite gotten across, although the front feet of the horses might have been over there; that it was from this point that they started up at a trot; the driver whipped them up; when the motorman first saw the herdic it was only ten feet west of the sidewalk and about ten or twenty feet, something like that, west of the curb. The car struck the hind wheel of the herdic, and struck the middle of it, too. The first attempt of the motorman to check his car was to reverse it; that his controller at that time was off to nothing; that when he reversed he blew his overhead switch, and that was because he reversed too sud-

denly—put it on too many points at once—built it up a little too fast for the change of current; had the controller reversed to the fifth point at the time the switch blew; then attempted to put on brake when he was about eight feet from the herdic and then stopped the car within five feet after the collision.

"Q. You did not see the officer run out to warn you, did
31 you? A. No, sir; I did not see anyone.

"Q. And that was because you had your head turned to the north? A. I was looking straight up the track.

"Q. You said a few minutes since that your head was turned——

"Mr. PERRY: He did not say it was at this time though, Mr. Mather.

"Mr. MATHER: I think that is a perfectly fair question. He has answered it.

"Mr. PERRY: He has not said that at the time he did this his face was to the north.

"The WITNESS: At that time I was looking up, looking to the north; but just after that I was looking straight up the track.

"Q. As I understood you, you said you were looking north until you saw the herdic. A. Yes, sir.

"Q. That is right is it not? A. Yes, sir.

"Q. And when you first saw the herdic it was from ten to twenty feet ahead of you? A. Yes, sir.

"Q. You were looking directly along the tracks, however, when you approached to within eight feet of the herdic? A. Yes, sir.

"Q. And I say the reason you did not see the officer or hear
32 him was that you were looking up to the north at that time. That is right, is it not? A. Yes, sir."

Witness sounded the gong at 16th Street before he saw the herdic on the south track; sounded it for a wagon which was up by the pumping station near the corner of 17th and U streets at the time the accident happened: does not know how many times he sounded the gong before striking the herdic but two or three times he reckons. "We always ring the bell when we get to a street crossing—a crowded street; that is the rule of the company to sound the gong at all crowded streets."

Thereupon counsel for the defendant, the Capital Traction Company, announced that their case was closed.

And next thereupon the plaintiff prayed the Court to instruct the jury as follows:

"You are instructed that if you believe from the evidence that the plaintiff while a passenger on one of the Metropolitan Coach Company's herdics going north along 16th Street, was injured by reason of a collision occurring between that coach and the car of the defendant company, and that said collision occurred by reason of the negligent and careless operation of the car, then your verdict will be for the plaintiff in this case."

Whereupon counsel for the defendant, the Capital Traction Company, conceded the correctness of said prayer.

And next thereupon counsel for the plaintiff prayed the Court to instruct the jury as follows:

"If you find from the evidence that the defendant, Capital
33 Traction Company, was running its car at the time of the accident at a rate of speed exceeding that allowed by law, 15 miles between streets and 6 miles over crossings, or failed to ring its bell as a warning of the approach of the car when passing over the 16th street crossing, you are instructed as a matter of law that such excessive rate of speed, or the failure to ring the bell, was negligence on the part of said defendant railway company; and if you further find from all the evidence that as the result of either or both of said violations of law the plaintiff was injured, she is entitled to recover."

To the granting of which prayer counsel for the defendant, the Capital Traction Company, objected, on the ground that it erroneously stated certain acts specified in said instruction as negligence in law; but the Court overruled the said objection and read the said instruction to the jury over the objection of the defendant, to which action of the Court the counsel for the defendant, the Capital Traction Company, excepted, and the trial justice entered the said exception upon his minutes.

And next thereupon counsel for the plaintiff prayed the Court to instruct the jury as follows:

"If you find from the evidence that the plaintiff exercised no control over the conduct of the driver of the Metropolitan Coach Company, then the plaintiff is not responsible for any acts of negligence upon the part of said driver; and if you further find from the evidence that the accident was occasioned either wholly
34 or in part by the negligence of the Capital Traction Company, said Capital Traction Company is liable therefor, to the plaintiff, notwithstanding the fact, if you should find it to be a fact, that the driver of the Metropolitan Coach Company was also negligent."

Which instruction counsel for the defendant, the Capital Traction Company, conceded to be correct.

And next thereupon counsel for the plaintiff prayed the Court to instruct the jury as follows:

"If you find for the plaintiff upon the evidence and the law as declared by the Court, then it will become your duty to award such damages as you believe from the evidence will be full and adequate compensation for such physical pain and suffering, and such mental suffering consequent thereupon, and such personal inconvenience and injury, and loss of earning capacity, as you may find from the evidence to have resulted actually and approximately to the plaintiff from the accident."

The correctness of which instruction was conceded by counsel for the defendant, the Capital Traction Company.

And next thereupon counsel for the defendant, the Capital Traction Company, prayed the Court to instruct the jury as follows:

If the jury shall find from the evidence that at the time and place

in question a coach of the defendant, the Metropolitan Coach Company, was about to cross the southern track of the defendant the Capital Traction Company at the intersection of Sixteenth
35 and U streets, northwest, in the City of Washington, District of Columbia, and that the driver of said coach, before crossing, pulled up his horse as if to stop them before crossing said track, and if the jury shall further find from the evidence that a car of the defendant the Capital Traction Company was approaching said intersection along the said tracks from the east, and that the motorman of the said car so approaching from the east applied the brakes to his car upon perceiving the said herdic coach about to cross the said south track, and then saw the driver of the coach of the defendant the Metropolitan Coach Company pull up his horses as if about to stop the said coach, then the jury are instructed as matter of law that the motorman of the car of the defendant, the Capital Traction Company, had a preferential right of way over the driver of the said coach to proceed upon his way westward, and had the right to assume that the said driver would not renew his attempt to cross the said track until the said car had passed in front of him. And if the jury shall further find from the evidence that after the said driver had so pulled up his horses the said motorman released his brakes from said car and proceeded along the said track to the westward, and that thereupon the said driver renewed his attempt to cross the said track in front of the said car, and drove his horses across the said tracks in front of the said car at so short a distance from the said car that the motorman thereof was unable by the use of reasonable diligence to stop the said car after the said driver had renewed his attempt to cross in front of the said car as aforesaid in time to avoid the said collision, and that thereupon the colli-
36 sion in question occurred between the said car and the said coach, injuring the plaintiff, who was a passenger upon the said coach, then the jury are instructed as matter of law that the motorman of the defendant the Capital Traction Company was not guilty of any negligence in the premises, and their verdict should be for the defendant, the said Capital Traction Company."

Which instruction the Court gave to the jury. To the granting of which instruction the plaintiff objected, and took an exception, which exception was duly noted by the Court upon its minutes.

And next thereupon, counsel for the defendant, the Capital Traction Company, prayed the Court to instruct the jury as follows:

"The jury are instructed as matter of law that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that the defendant, the Capital Traction Company, was negligent on the occasion in question, and that this negligence was the proximate cause of the injury to the plaintiff."

Which instruction the trial justice gave to the jury.

And next thereupon the Court charged the jury as follows:

"Gentlemen, the plaintiff in this case charges the defendant company with being negligent by reason of the fact that its car collided with the herdic coach in which this plaintiff was riding; and
37 this collision she claims was caused by the negligence of this defendant railway company. That is her claim.

"Now, as I have said to you so many times before, the burden of proof is upon this plaintiff to show, by the fair weight of the testimony, that her injury was occasioned by reason of the negligence of this defendant company. I have explained to you time and time again what is meant by a preponderance of the proof. It is the weight of the evidence. I shall not trouble you again by explaining what I have already said to you so many times. The burden rests upon the plaintiff always of showing, by the fair weight of the testimony that the injury sustained has resulted from the negligence of the defendant. The rule of law that is to guide you is simple—the law being perfectly plain and easily understood by you.

"You are instructed that if you believe from the evidence that the plaintiff while a passenger on one of the Metropolitan Coach Company's herdics going north along 16th Street, was injured by reason of a collision occurring between that coach and the car of the defendant company, and that it occurred (that is, the collision) by reason of the negligent and careless operation of the car, then your verdict will be for the plaintiff in this case.

"That is a perfectly plain proposition.

" 'If you find from the evidence that the defendant, Capital Traction Company, was running its car at the time of the accident at a rate of speed exceeding that allowed by law—15 miles between streets, and six miles over crossings—or failed to ring its
38 bell as a warning of the approach of the car when passing over the 16th Street crossing, you are instructed as a matter of law that such excessive rate of speed, or the failure to ring the bell, was negligence on the part of said defendant railway company; and if you further find from all the evidence that as the result of either or both of said violations of law the plaintiff was injured, she is entitled to recover.' "

"That is, the law provides that these street car companies may run between streets at the rate of fifteen miles an hour, and crossing streets they may run at six miles an hour. To run faster is a violation of the law: and if by reason of that violation—that is, the excessive rate of speed—or the failure to ring a bell, the accident in this case happened, the plaintiff would be entitled to recover. That is, if this accident occurred by reason either of running at an excessive rate of speed, or failing to ring a bell, or both together, then the plaintiff would be entitled to recover in this case.

"The mere fact that they ran at an excessive rate of speed, whilst it is unlawful to do so, does not make a railroad company liable to a person who has been injured, unless it is shown that that excessive rate of speed, or the failure to ring the bell, was the cause of the injury. Then, if both those things are combined, of course they would be liable for the injury.

"In that connection I ought, likewise, to read this prayer to you:

" 'If the jury shall find from the evidence that at the time
39 and place in question a coach of the defendant, the Metropolitan Coach Company, was about to cross the southern track of the defendant, the Capital Traction Company, at the intersection of 16th and U Streets, northwest, in the City of Washington,

District of Columbia, and that the driver of said coach, before crossing, pulled up his horses as if to stop them before crossing said track, and if the jury shall further find from the evidence that a car of the defendant, the Capital Traction Company, was approaching said intersection along the said tracks from the east, and that the motorman of the said car so approaching from the east applied the brakes to his car upon perceiving the said herdic coach about to cross the said south track, and then saw the driver of the coach of the defendant, the Metropolitan Coach Company, pull up his horses as if about to stop the said coach, then the jury are instructed as matter of law that the motorman of the car of the defendant, the Capital Traction Company, had a preferential right of way over the driver of the said coach to proceed upon his way westward, and had the right to assume that the said driver would not renew his attempt to cross the said track until the said car had passed in front of him. And if the jury shall further find from the evidence that after the said driver had so pulled up his horses the said motorman released his brakes from said car and proceeded along the said track to the westward, and that thereupon the said driver renewed his attempt to cross the said track in front of the said car, and drove his horses across the said tracks in front of the said car at so short a distance from the said car that the motorman thereof was unable by
40 the use of reasonable diligence to stop the said car after the said driver had renewed his attempt to cross in front of the said car as aforesaid in time to avoid the said collision, and that thereupon the collision in question occurred between the said car and the said coach, injuring the plaintiff, who was a passenger upon the said coach, then the jury are instructed as matter of law that the motorman of the defendant the Capital Traction Company was not guilty of any negligence in the premises, and their verdict should be for the defendant, the said Capital Traction Company.'

"That prayer, gentlemen, simply means this: If you believe from the testimony in this cause that the motorman of the car saw the driver of the herdic about to cross the track, and that thereupon the motorman would — up his brakes, preparing to stop his car; that he then saw the driver of the coach pull up his horses to let the car pass, and, seeing the driver pull up his horses, the motorman thereupon let his brake out again, he having seen the driver stop to let the car go by, or about to stop to let it go by, the car had the preferential right of way to cross there before the coach; and the motorman had the right to assume that the driver was going to permit him to go in front of him; and if, with that idea and conviction, he let go of the brakes to go ahead, and, after he started ahead, the driver of the coach again started ahead, so close in front of the car that the motorman could not, by the use of ordinary care, prevent a collision, and a collision occurred by reason of those facts, then, as a matter of law, the defendant company in this case would not be liable
41 for negligence, by reason of having struck the coach.

"That is what that prayer means in as short, plain language as I can put it.

"So that is one theory of the case. If you, therefore, find that the motorman had started to stop his car, and had the car under control, and was going to stop it, and the coach company's driver stopped as if to wait until the car passed, then, as a matter of law, the car had the right of way there, and the motorman had the right to assume that the driver was going to wait until his car passed over; and if thereupon the Coach Company's driver started in front of and so close to the car that the motorman by the use of every care (that is, of every ordinary care) on his part to try to stop the car, could not stop it, of course the railroad company would not be liable because there would be no negligence then on the part of the motorman.

"Those are the two sides of the case; but there is another phase of the case. If the defendant company in this case was not negligent, then you cannot find a verdict for the plaintiff against that company; but, on the other hand, if you find that the Capital Traction Company, the defendant in this case, was negligent, or that its negligence was in part or altogether responsible for this accident, and you also find that the Coach Company was partly responsible, too, by its negligence, still that does not affect the plaintiff's right to recover. The plaintiff's right to recover in this case is absolute, if the defendant company was negligent and contributed altogether or partly to this accident; and if the accident partly occurred through
42 the negligence, also, of the Coach Company, still, if you find the plaintiff had no control over the Coach Company (and, of course, from the evidence she had not), even if they were both negligent, the plaintiff would be entitled to recover.

"So that is this prayer:

" 'If you find from the evidence that the plaintiff exercised no control over the conduct of the driver of the Metropolitan Coach Company, then the plaintiff is not responsible for any acts of negligence upon the part of said driver' "—

"That is, if you find from the evidence that the plaintiff exercised no control over this coach driver, and of course she did not; there is no evidence of it—

" 'Then the plaintiff is not responsible for any acts of negligence upon the part of said driver; and if you further find from the evidence that the accident was occasioned either wholly or in part by the negligence of the Capital Traction Company, said Capital Traction Company is liable therefor to the plaintiff, notwithstanding the fact, if you should find it to be a fact, that the driver of the Metropolitan Coach Company was also negligent.' "

"Therefore, if you find that this defendant company was negligent, and the accident resulted from that negligence, then the plaintiff is entitled to recover, although you may also find as a fact that the Coach Company's driver also was negligent. I hope you understand what that means. Now gentlemen——

"Mr. PERRY: I would like your Honor to say to them that that has nothing to do with the independent negligence of the
43 Capital Traction Company, and that they have to find first that the Capital Traction Company was independently negligent.

"The COURT: So I have said several times. In other words, if you should find the Coach Company was negligent, and the Capital Traction Company was not negligent, you could not find for the plaintiff in this case. You could not find for her at all. But if you find that the negligence of the Capital Traction Company caused this accident, then you are entitled to find a verdict against it, even though you may also find that the Coach Company was negligent. But always, before you can find against the defendant you are first compelled to find that the defendant was negligent and that that was the cause of the accident.

"Now, if you find that there was no negligence on the part of the defendant company, then of course your verdict should be for the defendant. If, on the other hand, you find that it was negligent, and that that was the cause of this accident, then you must go a step further and assess the amount of damages.

"The rule governing damages, which I will read, is plain, in itself, and requires no explanation:

" 'If you find for the plaintiff upon the evidence and the law as declared by the Court, then it will become your duty to award such damages as you believe from the evidence will be full and adequate compensation for such physical pain and suffering, and such mental suffering consequent thereupon, and such personal inconvenience and injury, and loss of earning capacity, as you may find
44 from the evidence to have resulted actually and approximately to the plaintiff from the accident.' "

"In other words, gentlemen, she is entitled to recover for such pain and suffering, mental and physical, as she may have endured by reason of this accident, and which resulted proximately from the accident.

"Now, gentlemen, you may go."

And thereupon, before the jury had retired to consider of their verdict, counsel for the defendant, the Capital Traction Company, prayed the Court to sign and seal this, its bill of exceptions, which was accordingly done *nunc pro tunc* this Third day of October 1910.

HARRY M. CLABAUGH,
Chief Justice.

O. K.
L. J. MATHER,
J. P. McMAHON,
Att'ys for Pl'ff.

Designation of Record.

Filed October 3, 1910.

* * * * * * *

The Clerk will please prepare the following as the record on appeal in the above entitled cause:

1. Declaration filed March 24, 1909.
45 2. Plea of the Capital Traction Co. filed April 10, 1909.
3. Plea of the Metropolitan Coach Co. filed April 23, 1909.
4. Joinder of Issue filed April 24, 1909.
4. Memorandum—Leave to file Amended Declaration, May 13, 1910.

6. Amended Declaration, filed May 13, 1910.
7. Plea of the Metropolitan Coach Co. filed May 14, 1910.
8. Plea of the Capital Traction Co. filed May 19, 1910.
9. Joinder of issue, filed May 19th, 1910.
10. Verdict for Metropolitan Coach Co., May 31, 1910, (copy in full from minutes).
11. Verdict for plaintiff against the Capital Traction Co., June 1, 1910, (copy in full from minutes).
12. Motion for New Trial, filed June 4, 1910.
13. Judgment for Metropolitan Coach Co., June 16, 1910, (Copy in full from minutes).
14. Judgment against Capital Traction Co., June 24, 1910, (copy in full from minutes).
15. Memorandum of supersedeas bond on appeal, July 1, 1910.
16. Bill of Exceptions submitted to court, July 12, 1910.
17. Order making Bill of Exceptions of record, October 3, 1910.
18. Bill of Exceptions, October 3, 1910.
46 19. Memorandum—Time to file transcript of record extended to October 24, 1910.
20. This designation.

R. ROSS PERRY & SON &
G. THOMAS DUNLOP,
Attorneys for Capital Traction Company.

We agree that the foregoing papers contain all that is necessary for a hearing upon appeal in the above entitled cause and we do not desire any additional papers to be inserted in the record.

LEONARD J. MATHER,
JOHN P. McMAHON,
Attorneys for Plaintiff.

47 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 46, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51502, Law, wherein Sarah Vawter, is Plaintiff, and The Capital Traction Company, a corporation, et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 19th day of October, A. D., 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2240. The Capital Traction Company, a corporation, appellant, vs. Sarah Vawter. Court of Appeals, District of Columbia. Filed Oct. 19, 1910. Henry W. Hodges, clerk.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1910.

No. 2240.

THE CAPITAL TRACTION COMPANY, A CORPORATION, APPELLANT,

vs.

SARAH VAWTER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

R. ROSS PERRY,
R. ROSS PERRY, JR.,
G. THOMAS DUNLOP,
Attorneys for Appellant.

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

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vs.

SARAH VAWTER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

Statement of Facts.

Plaintiff below, Sarah Vawter, filed her suit in the Supreme Court of the District of Columbia against The Capital Traction Company and Metropolitan Coach Company on the 24th day of March, 1909. By her original declaration she sets out that on the 31st day of October, 1908, she became a passenger on one of the coaches of the Metropolitan Coach Company, operating a line of herdics on 16th street in this city, which herdic was bound in a northerly direction along said 16th street and that as it was crossing the tracks of The Capital Traction Company on U street, a car of the said Capital Traction Company approaching said crossing from the east collided

with said herdic; that it was the duty of the driver of the herdic and of the motorman of the car to so guide, control, manage and conduct the said herdic and the said car as to avoid imperiling the safety of the passengers in the herdic; but that unmindful of such duty, the defendant Coach Company was negligent in that its driver failed to ring his gong or bell and failed to look out for any on-coming cars and to bring his herdic to a standstill on the south side of the said street-car tracks so as to avoid striking or being struck by the said car, and that the defendant, The Capital Traction Company, was negligent in that its motorman ran its car over said crossing at a high, unlawful and dangerous rate of speed, failed to ring his bell and in any manner to indicate the approach of said car, and failed to keep his car so reasonably under control as to enable him to stop it before colliding with the herdic, by reason of which negligence plaintiff was injured, etc. Plaintiff claimed $5,000 damages (Rec., p. 2).

On May 13, 1910, plaintiff filed an amended declaration with leave of court setting up substantially the same facts, except that she states no specific acts of negligence on the part of the defendant, Metropolitan Coach Company, whose passenger she was, intending to rely, according to the statement of her counsel, upon the doctrine of *res ipsa loquitur* with respect to said defendant Coach Company, she being its passenger (Rec., p. 4).

Upon this amended declaration issue was joined and a trial begun before a jury on May 31, 1910. Whereupon, the jury having been sworn to well and truly try the issues in said cause joined, the plaintiff gave in evidence her own testimony, the testimony of her attending physician as to her injuries, and the testimony of witnesses Slater and Foley, tending to prove that the accident in question was not due to negligence on the part of the driver of the herdic, but to negligence on the part of the

motorman of the car of The Capital Traction Company. The Police Regulations of the District of Columbia with respect to speed of cars between crossings and at crossings were also introduced, and thereupon the plaintiff rested her case (Rec., pp. 9, 10, 11, and 12).

Counsel for the defendant Coach Company thereupon moved the trial justice to direct the jury to return a verdict in favor of the said Coach Company (Rec., p. 12). Whereupon, over the objection of counsel for the defendant, The Capital Traction Company, and after argument, the court directed the jury to find a verdict in favor of the defendant, the Metropolitan Coach Company (Rec., p. 14), and immediately then and there the verdict of the jury was taken as directed by the court. This verdict in favor of the defendant, the Metropolitan Coach Company, was then and there entered upon the minutes of the court as follows (Rec., p. 7):

"SUPREME COURT OF THE DISTRICT OF COLUMBIA.

TUESDAY, *May 31st, 1910.*

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, chief justice, presiding.

. . . . . .

Comes now as well the plaintiff by her attorneys Messrs. Mather & McMahon, as the defendants, by their respective attorneys of record, and a jury of good and lawful men of this District, to wit: Nicholas R. Grimm, Rob't F. Walker, Chas. F. Herrmann, Rob't G. Amies, Chas. L. Howard, Patrick Dugan, John T. Hendrick, Chas. M. Pugh, Dornin Ellis, Chas. W. Cheek, Daniel I. O'Connor, and George C. Croswell, who are duly sworn to well and truly try the issues herein joined, and after hearing the same in part, and being given the case in charge as to the defendant Metropolitan Coach Company, say they find herein in favor of said defendant, and after further hearing the issues herein as to defendant Capital Traction Company, the jury is respited until tomorrow morning at ten o'clock."

To which action of the court the defendant, The Capital Traction Company, then and there excepted (Rec., p. 14) and the trial justice entered the said exception upon his minutes.

Thereafter the trial was resumed, and the defendant, The Capital Traction Company, gave in evidence the testimony of Fred. P. Sawyer, the driver of the herdic in question, to the effect that he thought he was going south, instead of north, at the time; that he had watered his horses at the watering trough north of U street and had started south, and that he saw a car approaching from the west and coming east toward him, and that was the last he could remember (Rec., p. 14). The said defendant, The Capital Traction Company, also gave in evidence the testimony of witnesses Medler, a passenger on the said car, and Pearson, the motorman thereof, tending to prove that the said collision was due to negligence on the part of the driver of the said herdic, and not to negligence on the part of the said motorman, which was all the evidence in the case (Rec., pp. 15, 16, 17). After the submission of certain prayers both on behalf of the plaintiff and on behalf of the defendant, The Capital Traction Company, the court charged the jury fully upon the law of the case, and it was again submitted by the court to the jury to find a verdict (Rec., p. 23), which the jury did on June 1, 1910, in favor of the plaintiff and against the defendant, The Capital Traction Company, in the sum of $500 (Rec., p. 7). The minutes of the court with respect to this second verdict in the cause are as follows (Rec., p. 7):

> "SUPREME COURT OF THE DISTRICT OF COLUMBIA.
>
> WEDNESDAY, *June 1st, 1910.*
>
> Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, chief justice, presiding.
>
> . . . . . .
>
> Come again the parties hereto aforesaid, in

> manner aforesaid, and the same jury that was respited yesterday, who after further hearing the case and being given the same in charge, upon their oath say they find the issues herein in favor of the plaintiff as against the defendant Capital Traction Company, and assess her damages by reason of the premises, in the sum of five hundred dollars."

Thereafter a motion for a new trial was filed and heard, one of the grounds of said motion as stated by counsel for the defendant, The Capital Traction Company, being "that the court erred in instructing the jury at the close of the plaintiff's testimony, in chief, to render a verdict for the defendant, Metropolitan Coach Company.". This motion for a new trial was argued and it was there contended by counsel for The Capital Traction Company that it was error for the court to have permitted two separate verdicts in the cause and that there could be but one verdict and one judgment in a cause, which verdict should comprise all the issues involved therein.

The record in this cause also shows that on June 16, 1910, judgment was entered on the verdict in favor of the defendant, the Metropolitan Coach Company (Rec., p. 8), and that on another day later, to wit, on June 24, 1910, the motion for a new trial filed by the defendant, The Capital Traction Company, was overruled and another and separate judgment in favor of the plaintiff and against the said defendant, The Capital Traction Company, was entered (Rec., p. 9).

From this judgment the defendant, The Capital Traction Company, has appealed to this court.

Assignments of Error.

1. The court erred in directing a verdict in favor of the defendant, the Metropolitan Coach Company, at the close of the plaintiff's case (Rec., p. 14), to the prejudice of the co-defendant, The Capital Traction Company,

which action of the court was objected to by the defendant, The Capital Traction Company, because counsel for said Capital Traction Company contended that the jury should have heard all the evidence in the case before rendering their verdict and that such verdict when rendered should have comprised all the issues involved in the cause, but the court directed the said verdict and the jury found the said verdict over the objection of the said defendant, The Capital Traction Company; to which action on the part of the court the defendant then and there excepted, and the court entered the said exception upon its minutes.

2. The court erred in permitting a verdict to be rendered by the jury and made of record which did not comprise all of the issues involved in the trial of the said cause.

3. The court erred in permitting two verdicts separate and distinct from each other to be rendered by the jury and to be made of record in said cause neither of which verdicts comprised all of the issues involved in the trial of the said cause, the two separate and distinct verdicts being entered upon the record as follows (Rec., p. 7):

> "SUPREME COURT OF THE DISTRICT OF COLUMBIA.
>
> TUESDAY, *May 31st, 1910.*
>
> Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, chief justice, presiding.
>
> . . . . . .
>
> Comes now as well the plaintiff by her attorneys, Messrs. Mather & McMahon, as the defendants, by their respective attorneys of record, and a jury of good and lawful men of this District, to wit: Nicholas R. Grimm, Rob't F. Walker, Chas. F. Herrmann, Rob't G. Amies, Chas. L. Howard, Patrick Dugan, John T. Hendrick, Chas. M. Pugh, Dornin Ellis, Chas. W. Cheek, Daniel I. O'Connor and George C. Crosswell, who are duly

sworn to well and truly try the issues herein joined, and after hearing the same in part, and being given the case in charge as to the defendant Metropolitan Coach Company, say they find herein in favor of said defendant, and after further hearing the issues herein as to defendant Capital Traction Company; the jury is respited until to-morrow morning at ten o'clock:

WEDNESDAY, *June 1st, 1910.*

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

. . . . . .

Come again the parties hereto aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who after further hearing the case and being given the same in charge, upon their oath say they find the issues herein in favor of the plaintiff as against the defendant Capital Traction Company, and assess her damages by reason of the premises, in the sum of five hundred dollars."

4. The court erred in directing and permitting two judgments, separate and distinct from each other, to be entered of record in the same cause, the said separate and distinct judgments being entered upon the record as follows (Rec., p. 8):

"SUPREME COURT OF THE DISTRICT OF COLUMBIA:

THURSDAY, *June 16th, 1910.*

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, chief justice, presiding.

. . . . . .

It appearing that, under the rule of court judgment should be rendered herein on the verdict herein in favor of the defendant Metropolitan Coach Company, it is so ordered. Wherefore, it is considered, that the plaintiff herein take nothing by this action as against the defendant

Metropolitan Coach Company, that said defendant go hereof without day, be for nothing held and recover of plaintiff its costs of defense to be taxed by the clerk, and have execution thereof.

FRIDAY, *June 24th, 1910.*

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, chief justice, presiding.

. . . . . .

Upon consideration of defendant's motion for a new trial filed herein, it is ordered that said motion be and the same is hereby overruled and judgment on verdict is ordered; wherefore, it is considered that the plaintiff herein recover of defendant Capital Traction Company the sum of five hundred dollars ($500) with interest from this date together with costs of suit to be taxed by the clerk, and have execution thereof.

From the foregoing judgment, the defendant by its attorneys of record in open court notes an appeal to the Court of Appeals of the District of Columbia; whereupon, the penalty of a bond to operate as a supersedeas is hereby fixed in the sum of one thousand dollars."

ARGUMENT.

It was a well settled rule of practice, at common law, that the jury by their verdict must find all the issues made by the pleadings.

Leidig *vs.* Bucher, 74 Pa. St., 69.
Day *vs.* Brawley, 1 Pa. (1 Barr.), 429.
O'Neil *vs.* O'Neil, 4 Watts & Sergeant (Pa.), 130.
Am. & Eng. Enc. P. & P., vol. 22, pp. 864–872.

This is merely another way of saying that the verdict must respond to all the pleas.

Carr *vs.* Stevenson, 24 Tenn., 559.

When issue is joined upon the several pleas of several defendants, by the same rule it becomes necessary that the verdict shall dispose of all the parties to the suit.

Gulf C. & S. F. Ry. Co. *vs.* Renfro, 69 S. W., 648.
Kilbourn *vs.* Waterous, Kirby's Rep. (Conn.), 424.
Jenkins *vs.* Parkhill. 25 Ind., 473.

In Coke's Littleton, Lib. 3, cap. 5, sect. 366, pg. 227 (note), it is said:

> "A verdict that finds part of the issue, and finding nothing for the residue, this is insufficient for the whole, because they have not tried the whole issue wherewith they are charged. As if an information of intrusion be brought against one for intruding into a messuage and 100 acres of land, upon the general issue the jury finds against the defendant for the land, but saith nothing for the house."

To the same effect see—

Hooper *vs.* Shepherd, 2 Strange, 1089.
Miller *vs.* Trets, 1 Ld. Raym., 324.
Patterson *vs.* United States, 2 Wheat., 221.
Holmes *vs.* Wood, 6 Mass., 1.
Kerr *vs.* Meredith, 4 Yeates, 293.
Davidson *vs.* Bond, 12 Ill., 84.
Barbour *vs.* White, 37 Ill., 164.
Wood *vs.* Maguire's Children, 17 Ga., 361.

In the csse of Patterson against United States, 2nd Wheaton, 221–225, the Supreme Court of the United States say—

> "the rule of law is precise upon this point. A verdict is bad if it vary from the issue in a substantial matter, *or if it find only a part of that which is in issue.*"

And in Davidson et al. *vs.* Bond, 12 Ill., 84, the court held that it was error to render judgment against a part

of the defendants, while the cause remains undisposed of as to the others. The cause was assumpsit against several defendants; summons was returned on all of the six defendants, and subsequently judgment was rendered by default against the four defendants who had entered their appearance without making any order as to the other two.

> "This was unquestionably erroneous. At the common law, in action upon a joint contract or obligation, *the judgemnt must be rendered against all or none of the defendants*, and this has only been changed by our statute by allowing the plaintiff to take judgment against a part of the defendants, who alone had been served with process."

In Barbour et al. *vs.* White et al., 37 Ill., 172, the court say:

> "There are two technical errors in the record which are fatal to the judgment. The defendant, William L. Walter, was served with process, but no judgment was rendered for or against him. It is error to render final judgment against a part of the defendants, without disposing of the case as to the others. Dowe *vs.* Rattle, 12 Ill., 373."

This rule is founded upon reason as well as authority; for it is not merely a matter of form involving harmless error. It involves the rights of the parties in interest to the highest degree.

It is certainly not an inconsequential matter to the appellant here that its co-defendant, sued as a joint tort feasor with it in a declaration charging in one and the same count concurrent negligence by both defendants, is acquitted of all liability by the verdict, unless that verdict is read as it should be read as acquitting it also.

For assuming that there is no contribution between joint tort feasors, it nevertheless remains a fact that, were the judgment against both, the plaintiff would have had his election to have execution against either or both, and it could not be presumed that such judgment would be satisfied either wholly or partially out of this appellant.

And it is submitted that the verdict could properly only have been either for or against the two defendants jointly in this action. The declaration charges joint, concurrent, and disseverable acts of negligence (Rec., p. 5).

> "Plaintiff avers that it then and there beame and was the duty of the defendant Metropolitan Coach Company, by and through its driver, agent, or employee in charge of its said herdic, or coach, as likewise it was the duty of the defendant Capital Traction Company, by and through its agents and employes in charge of its said car, so to guide, control, manage, and conduct the said herdic, or coach, and the said car, respectively, as to prevent collision with each other, and to avoid endangering the safety of the passengers in said herdic, or coach; yet the plaintiff avers that, unmindful of its duty in the premises, the said defendant Metropolitan Coach Company, its driver or employee in charge of said herdic, or coach, conducted it so carelessly and negligently that, while said herdic, or coach, was crossing the tracks of defendant Capital Traction Company at the intersection of said streets, and before said herdic, or coach, had entirely crossed said tracks, the said car of the defendant Capital Traction Company collided with and crashed into said herdic, or coach, with great force and violence; and the plaintiff further avers that the defendant Capital Traction Company, unmindful of its duty in the premises was negligent in that its motorman when approaching said crossing was running said car at a high, unlawful and dangerous

rate of speed, failed to ring his bell, or in any manner indicate the approach of said car, and failed to keep said car so reasonably under control and guidance as to enable him to stop it before colliding with said herdic, or coach, and by reason of the negligence aforesaid the said car of defendant Capital Traction Company collided with and crashed into said herdic, or coach, of said defendant Metropolitan Coach Company, in which plaintiff was a passenger."

Where the declaration charges that an injury is the result of the concurrent negligence of two defendants, and the jury finds that it was caused by the negligence of but one of them there is a fatal variance.

Weist *vs.* Traction Co., 200 Pa. St., 148.

Little Schuylkill N. R. & C. Co. *vs.* Richards, 57 Pa. St., 142.

C. C. C. & St. L. Ry. Co. *vs.* Eggmann, 71 Ill. App., 42.

If the court shall therefore find that by necessary implication the first verdict did embrace thus all the issues, then the subsequent proceedings including the second verdict and judgment are nugatory and the court should direct that the first judgment below be reformed so as to include both defendants.

If on the other hand it be said that there are joined under the pleadings in this case more than one issue, then certainly it must be conceded that the first verdict did not find all the issues and is therefore fatally defective and is no verdict.

Had there been no verdict at the close of the plaintiff's case it is clear from the evidence subsequently produced on behalf of the defendant, The Capital Traction Company, that the jury might have found against *either* or both of the defendants.

Assuming that the first verdict was fatally defective for not finding all of the issues made by the pleadings, the same must be said of the second verdict.

In this state of the record, there having been no verdict, the cause should and must be remanded for a new trial.

No argument can be made against the rule of law contended for here on the ground of public policy or that the real rights of parties are violated or prejudiced by compelling a co-defendant against whom no negligence is proven by the plaintiff's case to await the verdict upon the entire proof, because if in fact when all the proof is in he can not be said to have been negligent, the court will so instruct the jury and the verdict will so declare. On the other hand, if upon the whole evidence it appears that he has been negligent and that he is wholly or jointly responsible for the injury complained of there would be surely no public policy in relieving him from liability therefor.

The rule that a sole defendant is entitled to have a verdict directed in his favor at the close of the plaintiff's case where the matters charged against him have not been proven, necessarily grows out of and is dependent solely upon the question of the burden of proof.

He is not entitled to such an instruction because he is *as a matter of fact not guilty* but because it has not been proven. Is it any hardship that, when he is sued jointly with others, the rule that there can be but one verdict in a cause may enable the plaintiff to supply the deficiency of proof against him from the whole evidence?

It appearing therefore that the ends of justice and public policy are best conserved by adherence to the rule of the common law, as contended for here, it would

seem advisable for this court to settle the practice in this jurisdiction in accordance therewith.

Benoist *vs.* Sylvester, 26 Mo., 585, 588.

Counsel are aware that in the case of Georgetown & Tennallytown R. Co. *vs.* Smith, 25 App. D. C., 259, 266, 268, a question similar to this in one of its phases was raised at the hearing on appeal, and that Mr. Justice Duell, in the course of the opinion with reference to it, said:

> "The first error is based upon the refusal of the court to instruct the jury that upon the whole evidence in the case the verdict should be for the defendant. It is insisted that it was error to refuse this instruction, first, because of a fatal defect in the pleadings, and, second, on account of contributory negligence. The first point grows out of the fact that the District of Columbia was joined as a defendant, and that upon motion made the court directed a verdict in its favor which left the railway company the sole defendant. The court commenced his charge to the jury by a statement of this fact, *and no objection was made to it, and no exception taken;* and the record fails to disclose that the question was raised at all in any way before the the trial court. *It does not appear that counsel, in asking this instruction, suggested that one of the grounds asked for the direction was that a verdict had been directed for the co-defendant.* The objection was not taken in proper form nor in proper time. Perry, Pl., p. 126; Norman *vs.* United States, 20 App., D. C., 494; Washington Gaslight Co. *vs.* Lansden, 9 App. D. C., 508. Aside from this we do not think that the objection could avail the appellant had it been taken in proper form and time."

It is clear therefore that the matter now before the court upon timely exceptions and after having been

called to the attention of the trial court and considered by him upon a motion for a new trial, was not before this court in the Smith case upon its merits.

It is therefore respectfully submitted that for the errors assigned herein to the prejudice of the defendant, The Capital Traction Company, the appellant, the judgment should be reversed.

R. ROSS PERRY,
R. ROSS PERRY, JR.,
G. THOMAS DUNLOP,
Attorneys for Appellant.

IN THE

Court of Appeals of the District of Columbia

OCTOBER TERM, 1910

No. 2240

THE CAPITAL TRACTION COMPANY,
A CORPORATION, APPELLANT

vs.

SARAH VAWTER

BRIEF FOR APPELLEE

LEONARD J. MATHER,
JOHN P. McMAHON,
Attorneys for the Appellee.

IN THE

Court of Appeals of the District of Columbia

OCTOBER TERM, 1910

No. 2240

THE CAPITAL TRACTION COMPANY,
A CORPORATION, APPELLANT

vs.

SARAH VAWTER

BRIEF FOR APPELLEE

Statement of the Case

Appellee, plaintiff below (hereinafter referred to as such), was a passenger in a north-bound herdic horse coach of the Metropolitan Coach Company, one of two defendant joint tort feasors, as claimed by the Declaration, which coach was run into by appellant's west-bound car at 16th and U streets, northwest; said appellant railway company being the other defendant tort feasor.

The Declaration avers no specific negligence against the

Metropolitan Coach Company, and no negligence was proved; although it does particularize negligence against the defendant railway company, which the evidence substantiated.

At the close of plaintiff's case, counsel for the defendant Metropolitan Coach Company moved for a verdict(R. 12).

The Court granted the motion, because no evidence had been adduced to show negligence on the part of this company (R. 14).

This ruling was excepted to, generally, by the defendant railway company (R. 14), but no specific objection thereto was either made at the time (R. 14) or at the conclusion of the Court's charge to the jury (R. 23).

At the close of all the testimony there was no evidence tending to show negligence on the part of the Metropolitan Coach Company; but, on the contrary, the proof was that plaintiff's injuries had been directly and solely occasioned by the negligence of the defendant railway company.

Argument

Although the evidence showed the defendant railway company alone was responsible for plaintiff's hurt, two exceptions were taken by this defendant to rulings of the trial court (R. 14, 18).

Taking up first the last noted of these, it will be seen 'twas but idly taken; for both this Court and the Supreme Court of the United States have repeatedly held that disobedience to the requirements of a statute, ordinance, or police regulation, is negligence *per se.*

Clements *vs.* Potomac Elec. Pow. Co., 26 App. D. C., 482, 500, 501.

Deserant *vs.* Cerillos Coal Ry. Co., 178 U. S., 409, 420.

Coming now to the general exception interposed by the defendant railway company (R. 14), we find no more *practical* merit in this than in the other.

No *ground* existed in fact for exception, and the court's order was in conformity with its long-established practice.

Nor did such ruling fail to dispose of any part of the case, or prevent the jury from finding upon the issues involved; for, necessarily, where two joint tort feasors are named as parties defendant, and there be no evidence submitted against one, the Declaration is reduced *pro tanto* under the consequentially directed verdict of the court, just as though one of several counts in a Declaration had been eliminated from the consideration of the jury.

In this case the Metropolitan Coach Company having been acquitted, so much of the Declaration as had impleaded it was eliminated from the consideration of the jury by the court's direction, and thereafter the charge remained single as to the defendant railway company; while the issue stood as to its guilt.

In Phillips' Evidence (8 ed.), 59, it is said:

> "It is now well settled, by the unanimous opinion of all the judges, that a defendant (in tort) against whom plaintiff adduces no proof, is entitled to a separate verdict at once, on the close of the plaintiff's case."

In Castle *et al. vs.* Bullard, 23 How., 172, 182, 184, 185, the plaintiffs in error were auctioneers, and an action on the case was brought against them by Bullard, who charged that certain of his goods had been consigned to the above firm and fraudulently sold by them. In passing upon the question of the guilt of one of the partners, Clifford, *J.*, said that although there was some difference of opinion as to what stage of a trial the party improperly joined may

insist upon a directed verdict, yet the law favored the exercise of the right at the close of the plaintiff's case.

To the same effect see:

Greenleaf on Evidence, (15 ed.), Vol. 1, Sec. 358, p. 497.
Chitty on Pleading (12 Am. ed.), Vol. 1, p. 88.
Childs *vs.* Chamberlain, 6 C. & P., 213.
Beasley *vs.* Bradley, 2 Swan. (Tenn.), 179.
Over *vs.* Blackstone, 8 Watts. & Serg. (Pa.), 71, 72.
Prettyman *vs.* Dean, *et al.*, 2 Harr. (Del.), 494, 495.
Brown *vs.* Burrus, 8 Mo., 26.
Brown *vs.* Howard, 14 Johns., 119, 120, 121.
Drake *vs.* Barrymore, 14 Johns., 166.
Railway *vs.* Miller, 79 Tex., 78, 85.
Railway *vs.* Smith, 25 App. D. C., 268.
Fuller Company *vs.* McCloskey, 38 W. L. R., 746, 747, 748.

Even supposing, for the sake of argument, that there was ground *in fact* for exception, the ruling, nevertheless, was perfectly harmless and unprejudicial, and cannot constitute error.

Hughes *vs.* Heyman, 4 App. D. C., 444, 452.
Raub *vs.* Carpenter, 17 App. D. C., 505, 518, 519.

As the evidence upon the question of the negligence of the Metropolitan Coach Company stood at the close of the plaintiff's case in chief, so it remained until the end of the case. It is true the defendant railway company offered Sawyer, the driver of the herdic, as its witness, but he in nowise changed the effect of the testimony, for so injured was he by the accident that his recollection of it was entirely obliterated (R. 14), and the court certainly would have been compelled to rule at the close of the testimony,

as it had already ruled upon the conclusion of the plaintiff's evidence in chief.

That the plaintiff could have suffered a non-suit at any time before verdict as to either or both of the joined defendants cannot be denied.

Was the right or power of the court to direct a verdict, whenever the evidence necessitated, any the less?

It made no difference, therefore, whether the verdict was directed at the one time or the other.

Again, as was said in Castle *vs.* Bullard, *supra*, if the motion was made, it was either grantable, as of right, at the close of the plaintiff's case; or, as held by some courts, was discretionary whether grantable then or at the close of all the evidence.

So, view the question as one may, it is at the utmost discretionary with the court as to what stage of the trial a verdict shall be directed, and, of course, the trial court's discretionary power is not reviewable here.

Raub *vs.* Carpenter, 17 App. D. C., 505, 519, 520.

But there was no exception taken either as to the question of variance, or the further point that there could not be two verdicts rendered in one and the same case; and it is not apprehended that these points can now be raised for the first time, even though anything of merit could possibly be found in them. Only a general objection was interposed (R. 14), and the attention of the trial court was not directed to these points either during the trial (R. 14, 23) or on motion for a new trial (R. 7, 8).

Ryan *vs.* Railway, 8 App. D. C., 542.
DeForest *vs.* U. S., 11 App. D. C., 458.
Fulton *vs.* Fletcher, 12 App. D. C., 1.
Tubins *vs.* D. C., 21 App. D. C., 267.

District of Columbia *vs.* Dietrich, 23 App. D. C., 577.
Whipple *vs.* Geddes, 25 App. D. C., 333.
McDermott *vs.* Severe, 25 App. D. C., 276.
Hutchins *vs.* Langley, 27 App. D. C., 234.
Brown *vs.* Savings Bank, 28 App. D. C., 351.
District of Columbia *vs.* Duryee, 29 App. D. C., 327.
Walker Furniture Co. *vs.* Dyson, 32 App. D. C., 90, 92.
Fuller Company *vs.* McCloskey, 38 W. L. R., 746, 747, 748.

Then, too, even if proper exception had been taken, it was waived; waived not only because such exception was not repeated at the conclusion of the court's charge, but, as well, by conceding the correctness of the instructions prayed on plaintiff's behalf.

See authorities, *supra.*

So, that, after all, when considering this question finally, we find that under no circumstances can this appeal be entertained; and this not only because it is a self-evident proposition that no one has cause to complain of what does not hurt him, but even if it could be said that the ruling apparently prejudiced the defendant railway company *in fact*, it could not as a *matter of law* be heard to complain. This, for the reason that there is no right of contribution as between joint tort feasors.

Could not the plaintiff, even though the verdict and judgment thereon had been joint, have executed upon the defendant railway company? No right of contribution existed, even though the Metropolitan Coach Company had alike been negligent. The defendant railway company would have had no right over.

How, then, can it be urged that this defendant has been harmed or prejudiced by the action of the trial court?

For the above reasons, viz: that no ground existed *in fact* for exception; that even had there been ground for exception, nevertheless, it was harmless and unprejudicial *as a matter of fact;* that no specific exception was taken; that whatever of right could possibly have existed under the general exception, was waived; and last, but by no means least, that *as a matter of law*, the ruling could not possibly have harmed the defendant railway company *in fact*, it is asked that this case be affirmed.

LEONARD J. MATHER,
JOHN P. MCMAHON,
Attorneys for the Appellee.